

February 6, 2015

Mr. Frederic D. Woocher
Strumwasser & Woocher, LLP
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90024

Re: Your Request for Advice
Our File No. A-15-004

Dear Mr. Woocher:

This letter responds to your request for advice on behalf of Larry Levine & Associates regarding the campaign provisions of the Political Reform Act (the “Act”).¹

QUESTIONS

1. Does an exemption similar to that found in Regulation 18450.1(b)(3) apply to the slate mailer electronic communication described below?
2. More generally, what identification and disclaimer requirements would apply under these circumstances?

CONCLUSIONS

1. No, an exemption from disclaimer requirements such as the provision that exists for ballot measure and independent expenditure advertisements where it is technologically impossible to include the disclaimer under Regulation 18450.1(b)(3) is not applicable to the slate mailer identification and disclaimer requirements contained in Section 84305.5 and Regulation 18435.5.
2. Although in this case, the candidates’ photographs are not being displayed on the Internet in a traditional slate mailer format, the four Los Angeles Community College District candidates are all making payments to a slate mailer organization for a position on a slate mailer

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

and included Internet advertising. Therefore, under Section 84305.5 and Regulation 18435.5, the slate mailer identification and disclaimers need to be included in a frame or frames preceding or following the four frames containing the four candidates' photos and stating the Los Angeles Community College districts for which each is running.

FACTS

You are requesting advice regarding what disclaimers, if any, would be required by the Act under the following circumstances. You represent a slate mailer organization that has historically distributed its "slate" recommendations and advocacy by mail and that intends to continue this practice for the upcoming Los Angeles Community College District elections in March 2015. The slate mailer will be supporting four candidates running for four separate seats on the Governing Board in that election, and the organization has received payment from each of these candidates for a position on its slate mailing.

In addition, due to advances in electronic technology, the slate mailer organization will for the first time be able to offer these candidates the opportunity to be featured in a series of electronic slate advertisements that will appear as "pop-up" advertisements when Internet users with IP addresses tracing to locations within the geographic boundaries of the Community College District view certain websites. The advertisements will consist of a sequence of photographs of each of the four candidates, each candidate being shown individually in succession for approximately 5-8 seconds, with their names and the offices for which they are running (e.g., "Los Angeles Community College District Governing Board, Seat #1") appearing directly below their photographs. The photographs of the candidates can also be preceded or succeeded - depending on what the Act might require - by a fifth image in this sequence, displayed for a similar 5-8 seconds, that displays the name of the slate mailer organization or some other disclaimer.

These electronic advertisements will not contain any words of "express advocacy," such as "vote for" or "elect," but will merely include the candidates' photos together with their names and the offices for which they are running. Because the advertisements and the images will be quite small, it is not feasible or practical for the images of the candidates themselves to contain any other text or disclaimers accompanying them.

You have reviewed Regulation 18450.1, among other regulations, and its exemption in subdivision (b)(3) would appear to apply to the type of electronic communication described above but for the fact that the disclosure requirements to which that subdivision's exemption applies do not by their terms include the slate mailer identification and disclaimer requirements set forth in Section 84305.5.

You therefore are requesting advice as to (1) whether a similar exemption would apply to the slate mailer electronic communication described above, and (2) more generally, what identification and disclaimer requirements would apply under these circumstances.

ANALYSIS

Slate mailers have sometimes proved confusing to voters in the past, appearing to be published by political parties when they are not, or by organizations of public safety personnel when they are not. Often, slate mailers contain photographs and endorsements of candidates who did not pay for or authorize their appearance in the slate mailer, and who may be of a different party from the majority of candidates and ballot measure positions advocated by the mailer. To alert the public about the confusing attributes of some slate mailers, the Legislature has passed successive bills imposing specific, heightened identification and disclaimer rules for slate mailers.

A slate mailer organization must clearly identify itself by including its name, street address, and city of the organization on each slate mail advertisement it produces. (Section 84305.5(a)(1).) In addition, the Act requires a slate mailer organization or committee to designate by an asterisk each candidate and each ballot measure supported or opposed in the mailer for which payment of \$100 or more has been received by the organization or committee (either from the candidate, ballot measure committee, or from any other person “at the behest” of a candidate or ballot measure committee). (Section 84305.5 and Regulation 18435.5(a).)

The slate mailer disclaimer specifically prescribed by the Act in Section 84305.5(a)(2) consists of the following statement:

“NOTICE TO VOTERS

THIS DOCUMENT WAS PREPARED BY (name of slate mailer organization or committee primarily formed to support or oppose one or more ballot measures), NOT AN OFFICIAL POLITICAL PARTY ORGANIZATION. Appearance in this mailer does not necessarily imply endorsement of others appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer. Appearance is paid for and authorized by each candidate and ballot measure which is designated by an *.”²

The disclaimer must appear in 8-point Roman type, with a reasonable degree of color contrast on a plain background. (Section 84305.5 and Regulation 18435.5.) The asterisk designating a candidate who has paid to be included in the slate advertising must be immediately following the name of the candidate. (Section 84305.5(a)(4).)

The slate mailer identification and disclaimer requirements also apply to slate mailers distributed electronically. The Commission’s Subcommittee on Internet Political Activity, in its August 2010 report, recommended that the same disclosure rules that apply to slate mailers sent by mail should apply to slate mailers sent by electronic means. In 2011, the Commission specifically amended the regulation concerning slate mailer requirements to add this point.

² For an electronic slate mailer it is permissible to modify the disclaimer required by Section 84305.5 slightly to make it fit the digital environment rather than postal mailing, changing the words “document” and “mailer” to “ad.”

Regulation 18435.5(d) states:

“(d) In addition to applying to slate mailers sent by traditional mail, the slate mailer identification and disclaimer requirements of Section 84305.5 apply to slate mailers distributed electronically.”³

Regulation 18450.1 implements the Act’s advertisement disclosure provisions that apply to ballot measure advertisements and advertisements paid for by independent expenditures supporting or opposing candidates or ballot measures (Sections 84503-84506.5). The provision of this regulation pertaining to electronic media states that such electronic advertisements must contain the required disclaimers just like television, print and radio ads. (Section 18450.4(b)(3)(G).) Section 18450.4(b)(3)(G)(iv) provides that certain electronic media advertisements, such as a text messages, whose size, space or character render it impracticable to include the *full disclaimer* specified in the advertisement disclosure rules may provide an *abbreviated disclaimer* containing the committee’s FPPC ID number and a link to the Secretary of State’s website displaying the committee’s campaign finance information if possible.

In addition, the definition of what constitutes an “advertisement” for purposes of the advertisement disclosure rules of Sections 84503-84506.5, excludes some items from the definition of advertisement because it is not possible to put the disclaimers on them, such as small campaign buttons and pens, campaign t-shirts, sky writing, etc. (Regulation 18450.1(b).) Included in this list is “an electronic media advertisement where inclusion of the *full disclaimer* required by Sections 84503-84506.5 or *even the abbreviated disclaimer* required by Regulation 18450.4(b)(3)(G)(iv) would be impracticable because it is technologically impossible to incorporate the disclaimer and the inclusion of the disclaimer would severely interfere with the committee’s ability to convey the intended message so that it can be understood by the audience.” (Regulation 18450.1(b)(3).)

You ask whether a similar exception is applicable to electronic slate mail. These provisions for abbreviated disclaimers on certain electronic advertisements and exemption from disclaimer when technologically impossible to include it, do not apply to electronic slate mail. As you noted, these regulations only interpret the advertisement disclosure rules for ballot measure and independent expenditure advertisements in Sections 84501-84510. By their terms, they do not apply to the slate mailer identification and disclaimer requirements set forth in Section 84305.5. In addition, even if a similar rule did apply, the facts at hand do not present a situation where it is technologically impossible to include the required disclaimer, or where the full slate mailer disclaimer cannot be included. Your request for advice stated that, in addition to the four frames with candidate photos stating the Los Angeles Community College District each

³ In addition, the Commission’s Enforcement Division recently brought a case under Regulation 18435.5(d) where an electronic version of a slate mailer failed to identify the slate mailer organization’s address. (*In the matter of California Voter Guide and Gary Crummitt*, FPPC No. 12/374.) Further, we note that the Commission’s amendment of Regulation 18435.5 supersedes the *Lacy* Advice Letter, No. A-06-017.

is seeking, an additional frame can precede or follow them with the required disclaimer. This frame can include the slate mailer identification and disclaimer required by Section 84305.5.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

John Wallace
Assistant General Counsel

By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl